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ACTION.

1. If, in the prosecution of a lawful employment, a pure accident occurs, no action can be supported for an injury arising therefrom. *Garris* v. *Railroad Company*, 324
2. It is otherwise where any blame or carelessness is attributable. *Ibid.*
3. Where the engine, running on the road of the Portsmouth and Roanoke Railroad Company, killed a steer under such circumstances as shewed that the killing was accidental; *Held* that the company were not responsible for the loss. *Ibid.*
4. The statute (Rev. Stat. c. 17, s. 7,) giving jurisdiction to a magistrate in the cases of stock killed on a railroad, does not alter the rules of the common law in relation to such injuries. *Ib.*
5. Where two persons took from the plaintiff, at the same time, several negroes, one claiming and keeping possession of a certain portion of them as his own, and the other in like manner claiming and holding possession of another portion as his: *Held* that the plaintiff could not maintain a joint action of detinue against them, though he might have had a joint action of trespass. *Slade* v. *Washburn*, 414
6. The gist of the action of detinue is not the original taking, but the wrongful detainer. *Ibid.*

See ACTION ON THE CASE, DECEIT, COVENANT, EJECTMENT, TRESPASS, TROVER, SLANDER.

ACTION ON THE CASE.

1. Where A carried on a suit in the name of B without or against the consent of the latter, whereby B was compelled to pay costs, B may maintain an action on the case against A, to recover damages for the injury he has thus sustained. *Metcalf* v. *Alley*, 38
2. Where A, in an action against B for damage, caused by his negligence, shews damage resulting from the act of B, which act, with the exertion of proper care does not ordinarily produce damage, he makes out a *prima facie* case of negligence, and must recover, unless B proves he has used proper care, or proves some extraordinary accident, which renders care useless. *Ellis* v. *Railroad Company*, 138
3. In an action on the case, unless the injury complained of be of such a nature that actions can continually be brought from time to time, the jury may assess all the damages the plaintiff has sustained up to the time of the trial—they are not confined to the damages sustained previous to the date of the writ. *Dailey* v. *Dismal Swamp Canal Co.*, 222
4. A constable gave a receipt to A B, as agent for C D, for a certain note to collect or return. A. B. transferred the receipt to E. F. by an endorsement on the back of the receipt. Afterwards A. B. collected the money: *Held* that E. F. could not recover this money from A. B. in an action for money had and received to his use, for the money was received to the use of the principal C. D., nor could he recover on a count for a bill of exchange, for it was no bill of exchange; nor on a guaranty, for he had

used no diligence in endeavoring to collect, nor given notice to the guarantor of a default in the principal. *Eason* v. *Dixon*, 343

See DECEIT, TROVER, SLANDER, TRESPASS, ACTION.

ADMINISTRATORS AND EXECUTORS.

See COSTS, LIMITATIONS.

AMENDMENT.

1. An amendment of an execution will not be allowed, when such amendment will prejudice the rights of third persons. *Cape Fear Bank* v. *Williamson*, 147
2. The Courts below have the power, at their discretion, and on such terms as they may prescribe, to add new plaintiffs to those mentioned in the writ and original declaration. *Green* v. *Deberry*, 344
3. The Superior Court has no right, on a trial before it, to permit a return of a constable to a County Court to be amended. *Smith* v. *Low*, 457

APPEAL.

1. Where an appeal has been taken from the judgment of a Justice of the Peace, the parties may, by consent, while the papers remain in the hands of the magistrate, set aside the appeal and have a new trial. *Wardens* v. *Cope*, 44
2. On petitions for distributive shares, which are in the nature of proceedings in Equity, an appeal for costs only will not be entertained, except under very peculiar circumstances. *Griffith* v. *Byrd*, 72
3. Where a mandamus is issued against the Justices of a county, in their official capacity as Justices of the County Court, and a judgment rendered against them, they may appeal, although a minority of the Justices refuse to join in the appeal. *State* v. *Justices of Moore*, 430
4. The rule as to appeals, in relation to joint *individuals*, defendants to a suit, does not apply. *Ibid.*

See ROADS.

ARREST.

1. If a known officer who has two warrants in his hands, the one legal and the other illegal, declare at the time of arrest that he makes the arrest by virtue of the illegal warrant, yet this is not a false imprisonment; for the lawfulness of the arrest does not depend on what he declares, but upon the sufficiency of the authority which he then has. *State* v. *Kirby*, 201
2. When an arrest is made by one, not a known officer, he is bound to make known, at the time, the warrant under which he arrests. *Ibid.*
3. A warrant from a magistrate in a civil case, upon which bail is not required, is in law but a summons, and gives no authority to arrest. *Ibid.*
4. An officer, who has arrested a prisoner under a State warrant, has a right to tie him, if he believes it necessary to secure him, and of this necessity he is himself sole judge. *State* v. *Stalcup*, 50
5. But if the officer is guilty of a gross abuse of this authority, that is, if he does not act honestly according to his sense of right,

but, under the pretext of duty, is gratifying his malice, he is liable to indictment, and the jury must judge of his motives from the facts submitted to them. *Ibid.*

6. In such a case those who are commanded by the officer to assist him and do assist him, are justified, though the officer himself has abused his authority, provided *they* acted *bona fide* in obedience to this command, and not to gratify his or their malice. *Ibid.*

ASSUMPSIT.

See ACTION ON THE CASE.

ATTACHMENT.

1. Unliquidated damages, such as damages which in their nature are uncertain, for the breach of an agreement, cannot be made the subject of attachment under our Attachment Law. *Hugg* v. *Booth*, 282

2. In an attachment, the defendant, by accepting a declaration and pleading to it, waives all objection to defects in the process. *Price* v. *Sharp*, 417

BAIL.

See GUARANTY.

BASTARDY.

1. In cases of bastardy, an examination of the woman, which does not appear to have been taken within three years from the birth of the child, is defective, and may be quashed; but the defect is not necessarily fatal, and all objection on that account is waived, if not made in the regular mode, and at the proper time. The objection should be made before the issue is tendered. *State* v. *Robeson*, 46

2. Notwithstanding such defect, the examination is evidence, on the trial of the issue, as to the truth of the charge. *Ibid.*

BENEFIT OF CLERGY.

When, upon a conviction for a clergiable offence, the defendant prays the benefit of clergy, and the Attorney General or Solicitor for the State objects, upon the ground that the prisoner has before had the benefit of clergy allowed him, he must present this objection in the form of a counterplea in writing. *State* v. *Carroll*, 257

BIGAMY.

See EVIDENCE 23. MARRIAGE 1, 2.

BILLS OF EXCHANGE, &c.

1. Protest of an order or inland bill of exchange is not necessary to enable the holder to recover principal and interest. Notice in due time of non-acceptance or non-payment is all that is required for that purpose. *Hubbard* v. *Troy*, 134

2. It is generally held that the holder must give notice of non-acceptance or non-payment on the next day or by the next post, when the parties live in different places. *Ibid.*

3. A delay in giving notice from the 10th to the 24th of March, held to be unreasonable and to discharge the drawer. *Ibid.*

4. When a bill of exchange made payable to a third person is protested and taken up by the drawer, the latter cannot again put it in circulation. *Price* v. *Sharp*, 417

5. A person cannot negotiate paper, when, by so doing, he would render responsible on it another person, from whom he had taken it up under a prior responsibility. *Ibid.*

6. But a person, who takes up a negotiable paper once due to himself, may again put it into circulation, provided that, in so doing, he exposes no person to a prejudice but himself, or those who are justly and legally liable on the paper before him. *Ibid.*

7. When a bill of exchange payable to A is taken up by the drawer and the endorsement of A stricken out, it becomes dead to all intents and purposes as a negotiable instrument. *Ibid.*

BONDS.

1. A bond cannot be delivered to the obligee as an escrow, for such a delivery would make it absolute at law: but it may be delivered by the sureties to the principal obligor as an escrow. *Blume* v. *Bowman*, 338

2. Where a bond has no subscribing witness, then the proof of the possession by the obligee, and of the handwriting of the obligors, is a sufficient ground for presuming that the bond was sealed and delivered by the obligors. *Ibid.*

3. The bare circumstance, that the name of a person, who did not execute the bond, is inserted in the body of it as one of the obligors, is not *of itself* evidence to shew that those, who did sign and seal and deliver it, delivered it only as an escrow, upon condition that that person should also execute it. *Ibid.*

See GUARANTY.

BOUNDARY.

A savanna, which is a natural open meadow, not uncommon in the lower part of the State, is a natural boundary, in the sense in which that term is used in the construction of deeds. *Stapleford* v. *Brinson*, 311

CHALLENGE TO JURORS.

See INDICTMENT.

CONSTABLE.

1. A constable is not obliged to receive claims for collection, as he is bound to obey a legal mandate; but if he does so receive them, he and his sureties are bound in respect thereof, under the act of 1818, (Rev. Stat. c. 34, s. 9,) so far as they have consented to be bound, "to endeavor diligently to collect them." The degree of diligence is no more and no less than is required by law from other collecting agents. *State* v. *Holcombe*, 211

2. A constable therefore, is not bound to sue out a warrant on a claim put in his hands for collection, when the issuing of such process would be entirely fruitless. *Ibid.*

3. In an action on a constable's bond, the constable's receipt for "an account" to collect, is not even *prima facie* evidence that the amount of the account or any part of it was really due. *Ib.*

4. It is not necessary that the County Court, authorized to appoint a constable in the case of a failure by the people to elect one or in case of a vacancy from any other cause, should be the Court immediately succeeding the time appointed for such election, or immediately succeeding such vacancy. The County Court, at a subsequent term, (seven justices being present) may fill the vacancy. *State* v. *Wall*, 267

5. An entry on the County Court records, that "on motion A. B. was permitted to renew his bond as constable, by giving C. D. and E. F. as securities, in the sum of $4,000," is not evidence that A. B. was duly appointed a constable. *Ibid.*

6. A bond executed by A. B. in pursuance of such an order, and without any other evidence of his appointment as constable, could not legally be accepted by the Court, and is therefore void. *Ibid.*

7. Seven justices must necessarily be present to make a valid appointment of a constable. If a less number be present, the appointment and the bond taken under it are both void. *State* v. *Wall*, 272, 275. *State* v. *Powell*, 275

8. The County Court has no jurisdiction to appoint a constable, except in case of a vacancy in the district. *State* v. *Lightfoot*, 306

9. The "County Town," which, under the statute (Rev. Stat. c. 24) relating to constables, is entitled to an additional constable, means the town which is the seat of justice for the county. *Ib.*

10. A constable is not bound (though it is safest for him to do so) to describe the land, returned by him to the County Court as levied on, precisely according to the directions of the statute, (Rev. Stat. c. 62, s. 16.) It is sufficient if he gives such a description as will distinguish and identify the land. *Smith* v. *Low*, 457

See ARREST, FORCIBLE ENTRY, PRACTICE.

CONSTITUTION.

The Act of Assembly (Rev. Stat. c. 89, s. 24.) authorizing the Wardens of the Poor to seize any horses, cattle, hogs, or sheep, belonging to a slave is not unconstitutional. *McNamara* v. *Kerns*, 66

CONTRACT.

1. An executory contract, the consideration of which is contra *bonos mores*, or against the public policy or the laws of the State, or in fraud of the State, or of any third person, cannot be enforced in a court of justice. *Blythe* v. *Lovinggood*, 20

2. When commissioners, appointed to sell lands for the State, at public auction, declared, as one of the conditions of the sale, that if the highest bidder did not comply with his contract, the next highest bidder should have the lands; an agreement was made between the highest bidder and the next highest, that the latter should give the former his note for one hundred dollars, in consideration that the former should not comply with his bid, and thereby permit the latter to obtain the land at an underbid. *Held* that such note was void on the ground of its fraudulent consideration. *Ibid.*

3. In a written contract the terms are fixed, and the meaning of those terms is a question of law. *Massey* v. *Belisle*, 170

4. So also is a parol contract where the terms are precise and explicit. *Ibid.*

5. But in a parol contract, if the parties dispute about the terms of the agreement, and these are obscure or destitute of precision or to be inferred from the conduct of the parties, the ascertainment of these terms is in the first place necessary, and this is clearly a question of fact. *Ibid.*

6. Where a promise, not under seal, is made to A. for the benefit of B., B. may bring an action in his own name, but the promise

must be laid in the declaration as having been made to B., and the promise actually made to A. may be given in evidence to support the declaration; for in such a case A. is considered as the agent of B. *Cox* v. *Skeen*, 220

7. But where it is apparent that A. was the principal, that the contract was for his benefit, and that B. was only to receive payment of the stipulated sum for and in behalf of A., then A. alone can bring the action. *Ibid.*

8. When in a contract no particular time for doing an act is specified, the general principal is, that it must be done in convenient time, to be judged of by the Court, according to the circumstances and situation of the parties, unless that be in some respects modified by the terms of the contract. *Waddell* v. *Reddick*, 424

9. Where A contracted to deliver cotton grown on his plantation in Florida, "as soon as it could be picked out and shipped," *Held* that he was not thereby restricted to the shortest possible time, in which, by any means, or upon any terms, he could convey the cotton to a sea-port, but that he was only bound to employ the usual mode of transportation, and, therefore, had a right to wait a reasonable time, to avail himself of that mode. *Ibid.*

See DECEIT, EVIDENCE, GUARANTY, VENDOR AND VENDEE, WARRANTY.

COSTS.

1. Although defendants in an action of trespass sever in their pleas, yet where there is but one judgment in their favor, as "that they go without day," they shall recover but one set of costs.—*McNamara* v. *Kerns*, 66

2. Where the guardian of an infant distributee sued the administrator of the estate the very day he was appointed guardian, and without any demand upon the administrator, and the administrator was guilty of no default, but promptly rendered an account, which was found to be correct; *Held* that the guardian should pay the costs of the suit. *Griffith* v. *Byrd*, 72

See APPEAL.

COVENANT.

1. Where in a bill of sale of a slave there was the following covenant: "which said negro I do hereby warrant and defend forever to the said John Harris, his heirs and assigns forever," and after the death of Harris, the value of the negro was recovered from his administrator in an action of trover, by one having a better title than the vendor; *Held* that such recovery in trover amounted to an eviction, and, therefore, the covenant was broken. *Lee* v. *Gause*, 440

2. *Held* also, that the administrator of Harris could support an action as administrator to recover damages for such breach, though the covenant was not broken until after Harris' death, and although the action of trover was brought against him personally, he having possession of the slave as administrator. *Ibid.*

3. Nor could the administrator in this State have united in this action one who was a joint administrator with him in South Carolina. *Ibid.*

DAMAGES.

SEE ACTION ON THE CASE—TRESPASS.

INDEX.

DECEIT.

1. Where at the time of the sale of land a false and fraudulent affirmation of its value was made, yet an action on the case for deceit will not lie, as the vendee might, by reasonable diligence, have informed himself of its true value. *Sanders* v. *Hatterman*, 32
2. It *seems* such an action will lie, if a false affirmation be made of the rent of the land. *Ibid.*
3. Where A agreed to buy a number of horses from B, and it was referred to an arbitrator to decide upon the value of the horses, and he decided that two of them were worthless, having an incurable and contagious disease, and so informed A, yet A took them, by a subsequent agreement, and kept them with his other horses, whereby he lost many of the latter; *Held*, that A could not maintain an action on the case in the nature of deceit against B. *Spencer* v. *McLean*, 93

DEED.

1. "Improper influence" constitutes no *legal* objection to the validity of a deed, but only furnishes a ground for the interposition of a Court of Equity. It is otherwise with a will. *Clary* v. *Clary*, 78
2. A was entitled to two tracts of land, an upper and a lower tract, and the water from the former was drained off by ditches running through the latter. By deed dated the 12th of May, 1797, he conveyed to his son Jones the lower tract, "a privilege of two leading ditches to Tucker Spencer excepted," and by deed dated the 13th of May, 1797, conveyed to the said Tucker Spencer, another son, the upper tract, but without saying anything of the privilege of those ditches; *Held*, that, even admitting the words in the deed to Jones to have amounted to a grant of the privilege to Tucker, still there is nothing to annex that grant to the upper tract of land, and transmit it with the land to an assignee. *Spencer* v. *Spencer*, 96
3. Every deed of conveyance of land must set forth a subject matter, either certain in itself or capable of being reduced to a certainty by a reference to something extrinsic to which the deed refers. *Massey* v. *Belisle*, 170
4. It is a settled rule of construction in this State that when "stakes" are mentioned in a deed simply, or with no other added description than that of course and distance, they are intended by the parties and so understood to designate imaginary points. *Ib.*
5. Where the question on trial was as to the boundary of a town lot, and the deed under which one of the parties claimed contained two descriptions, one saying it "adjoined" a certain other lot, and another giving a different description, the Court did not err in leaving it to the jury to decide which description they thought was intended by the parties to the deed—whether the parties in using the word "adjoining," might not have meant "near" as the word is sometimes used in common parlance. *Ibid.*
6. A deed of husband and wife, dated 1st March, 1834, was offered in evidence. To prove the due execution of the deed by the wife, a commission issued by the Court to two Justices of the Peace to take the private examination of the wife, dated 17*th February*, 1834, reciting that a deed had *theretofore* been executed by the husband and wife, and authorizing the Justices to take the private examination, together with the return of the

Justices indorsed on the deed of 1st March, 1834, was offered in evidence; *Held* that the deed of 1st March, 1834, was not the deed intended to be submitted to the commissioners, and that their certificate indorsed on that deed was made without authority, and was therefore void, and that of course the deed did not pass the title of the wife. *Rich* v. *Beeding*, 240

7. To make a deed valid, the grantees (unless by way of remainder) as well as the grantors must be in *esse;* at all events before the act of 1823, (Rev. Stat. c. 37, s. 22). *Newsom* v. *Thompson*, 277

8. A deed, executed in South Carolina, for a slave then being in this State, with certain limitations over, which by the law of that State are invalid but which by our law are good, must be construed according to the law of that State, and, therefore, the limitations over are void. *Morrow* v. *Alexander*, 387

9. A deed for a female slave and "her increase" can only convey the woman and her issue born after the execution of the deed. *Ibid.*

10. Where a father signed and sealed in South Carolina a deed for a slave to his daughter, who resided in North Carolina, and delivered it in South Carolina to his son, to be given to his daughter; *Held* that the delivery was complete, and the deed therefore well executed in South Carolina. *Ibid.*

See EVIDENCE—BOUNDARY.

DESCENT.

1. When an estate comes to a person, through a series of descents, or settlements, and that person dies without issue, it results back to those of his collateral relations, who would be heirs of the ancestor, from whom it *originally* descended, or by whom it was *originally* settled. *Wilkerson* v. *Bracken*, 315

2. Therefore where B., a daughter, took by descent from A., her father, and C., the daughter of B., took by descent from B., and then died, intestate and without issue, leaving uncles and aunts, who were not of the blood of A., but great uncles and aunts, who were brothers and sisters of A.; *Held* that the land descended to the latter. *Ibid.*

DETINUE.

See EVIDENCE—ACTION.

DEVISE.

1. A. by Will devised as follows: "I give to my son William certain negroes, (naming them,) to him, his heirs and assigns forever; but in case he should not arrive at the age of twenty-one years, or marry, my desire is that my daughter Sarah have the aforesaid negroes." Sarah married and died in the lifetime of William. Then William died unmarried and under age. *Held*, that the contingent interest thus bequeathed to Sarah in these negroes, was transmissible to her representatives, and on the death of William, under age and unmarried, became a vested absolute interest in her administrator. *Jacocks* v. *Mullen*, 162

2. And this construction is not affected by the circumstance that in another clause the testator gives other negroes to Sarah, with a like contingent limitation to William, in the event of Sarah's dying unmarried and under age. *Ibid.*

3. Parol evidence cannot be admitted to add to, subtract from, or modify a testamentary disposition, but it is properly admissible to identify the things therein described. *Kinsey* v. *Rhem*, 192

4. A. by will devised as follows: "I hereunto confirm the property I have heretofore given to my daughter Susan, and one dollar to her, her heirs and assigns forever." Under this devise a negro girl named Fan was claimed. It was proved that Fan's mother had been called in the family Susan's negro: that when Susan intermarried, this mother had been sent home with her and remained with her some time, and was afterwards taken back by the testator and continued with him till his death, claimed by him as his own; that the testator had quarrelled with Susan's husband; and, besides the mother of Fan, some articles of household furniture had been sent home with Susan, which had never been reclaimed. It also appeared that in similar devises to his other children, (four in number) he not only gave them in general terms the property he had before given them, but added, "including the negroes," (naming them.) *Held*, that the testator did not intend by this devise to convey any negro to Susan. *Ibid.*

5. A. devised as follows: "I lend my daughter, Nancy E. Moore, the following property, to-wit, negroes Lewis (and eleven others mentioning them by name) and one bed and furniture (and sundry other articles of furniture.) If my daughter Nancy E. should depart this life without issue, then it is my will that her husband, William C. Moore, should have one-half of the property I have lent to her; but the property is to be held in trust by my executors until the death of my daughter Nancy E., and then her half of the property is to be equally divided between her brother Joseph and her two sisters Martha and Rachel."—William C. Moore died, after the testator, leaving his wife Nancy surviving him, and then Nancy died without issue; *Held* that Wm. C. Moore took a contingent interest in remainder in one-half of the property, which upon his death was transmitted to his administrator, and that upon the death of Mrs. Moore, without issue, his administrator had a right to recover it. *Moore* v. *Barrow*, 436

DIVORCE.

1. A husband cannot obtain a divorce from his wife, on the ground of adultery committed by her after a separation, if such separation has been occasioned by the fault or at the instigation of the husband. *Moss* v. *Moss*, 55

2. A party applying for a divorce is bound by his admission, in the pleadings or on record, of facts which legally bar his application, even though a jury, on issues submitted to them, find a verdict in contradiction of such facts. *Ibid.*

EJECTMENT.

1. Where, in an action of ejectment, the defendant has entered a disclaimer as to a part of the land described in the plaintiffs' declaration, that part is not within the issue submitted to the jury, and evidence of title to it is therefore irrelevant.—*Waugh* v. *Andrews*, 75

2. In ejectment, the defendant, who has executed to the lessor of the plaintiff a deed for the land in controversy, to which *femes coverts* were parties, but which was not regularly proved as to them, cannot deny the plaintiff's right to recover. *Matthews* v. *Matthews*, 217

3. Where a demise in a declaration in ejectment was laid to be on the first day of January, and the service of the declaration appeared by the Sheriff's return to have been made on the thirty-

first of December preceding; *Held* that after the defendant has confessed the lease, entry and ouster, he is precluded from making any objection to the declaration on that account. *Fuller* v. *Wadsworth*, 263

4. A mortgagee, after the day of payment passed, may bring an action of ejectment against the mortgagor, without any notice to quit or demand of possession. *Ibid.*

EVIDENCE.

1. The party signing a deed or other instrument, or any person claiming under him, may show, that at the time such deed or instrument was signed, he was of insane mind. *Bullew* v. *Clark*, 23

2. The old doctrine, that a man cannot stultify himself has been long exploded. *Ibid.*

3. Sanity is presumed *prima facie*, and the party, who alleges insanity to avoid a deed, must prove it; but if a general mental derangement or lunacy is shown, previous to the execution of the instrument, the burthen of proof as to the sanity of the person executing the instrument at the time of its execution, is thrown upon the person offering the instrument in evidence. *Ibid.*

4. The entry of satisfaction of a judgment on the record is evidence to a jury, from which they may infer that the judgment has been paid; but *per se*, it only imports a release of the judgment, and it may be shown by extrinsic evidence that the judgment was not in fact paid. *Reynolds* v. *Magness*, 26

5. The rule, that, where parties have reduced their contract to writing, parol evidence shall not be introduced to alter or contradict the written instrument, applies only to controversies between the parties themselves, and those claiming under them. Between one of the parties and a stranger the rule does not apply. *Ibid.*

6. In an action against the Sheriff for the misconduct of a person alleged to be his deputy, it is not necessary to produce a written deputation, or to give notice to the Sheriff to produce it. It is sufficient to show that the person acted as deputy with the consent and privity of the Sheriff. *State* v. *McIntosh*, 53

7. In a civil suit against several persons, who have a joint interest, the declaration of one as to a fact within his own knowledge, is evidence against the others as well as himself. *Rowland* v. *Rowland*, 61

8. But where a suit, as for instance, an action of detinue, is brought against one for certain specified property, the declarations of another person, who holds other property under the same title, cannot be introduced to impugn the title of the defendant. He may be examined as a witness in the cause. *Ibid.*

9. A witness, who has had opportunities of knowing and observing a person whose sanity is impeached, may not only depose to the facts he knows, but may also give his opinion or belief as to his sanity or insanity. *Clary* v. *Clary*, 78

10. The declaration of a defendant that she "remembered giving the note, but believed she had paid it," is no evidence to rebut the presumption of payment arising under our Act of Assembly from the lapse of ten years, and the Judge has a right so to inform the jury. *Holly* v. *Freeman*, 218

11. In a suit by an administrator, one of the distributees of his intes-

tate cannot be a witness for him; but such distributee is a competent witness for the defendant, and if introduced by him, may be cross-examined by the plaintiff on any matter pertinent to the issue. *Cox* v. *Wilson*, 234

12 Where a jury are left in a reasonable and real doubt as to the credibility of a witness, they should disregard his testimony, and give such a verdict as they would have done, if he had not been a witness. *Miller* v. *Richardson*, 250

13. In an action by an administrator to recover a debt due to his intestate, a release by a distributee to the administrator of all his interest in the said debt if recovered, and also a release by the administrator to the distributee of all claim upon him for any part of the costs of the suit, if he should fail, will render the distributee a competent witness for the administrator. *Moffitt* v. *Lane*, 254

14. And per GASTON, J., the release by the distributee to the administrator will of itself render him a competent witness. *Ibid.*

15. Where a bond is made payable to an executor for the rent of lands, and suit is brought on it in his name, the guardian of the wards, who are in equity entitled to the rent, is a competent witness for the plaintiff. *Waddell* v. *Moore*, 261

16. It is not sufficient evidence of the loss of an execution which had been in the hands of a constable, so as to let in secondary evidence, to shew that the constable had removed to another State, and had left his papers generally with an agent, who testified that the execution was not to be found among the papers so left. *Deavor* v. *Rice*, 280

17. A verdict in an action of detinue against the plaintiff, on the plea of *non detinet*, is not sufficient evidence in another suit to shew that the plaintiff had not title to the thing demanded. *Long* v. *Baugas*, 290

18. If, in such a case, parol evidence can be introduced to shew the grounds on which the verdict was given, this evidence must prove conclusively that the jury could have found their verdict upon no other ground than want of title in the plaintiff. *Ibid.*

19. Where a witness on the part of the State, on his cross-examination, was asked, whether the prosecutor had not paid him for coming from another State to be a witness and answered that he had not, it is incompetent for the defendant to introduce witnesses to prove his declaration that he had been so paid. *State* v. *Patterson*, 346.

20. Where the fact, to which a witness deposes, constitutes a part of the transaction under investigation, then evidence of inconsistent statements by him, in relation to this fact, may be introduced to impeach his credit. *Ibid.*

21. But in respect to collateral matters, drawn out by cross-examination, the answers of the witness are in general to be regarded as conclusive. The exception to this rule is, when the cross-examination is as to matters, which, although collateral, tend to shew the temper, disposition or conduct of the witness towards the cause of the parties. The answers of the witness as to these matters may be contradicted. *Ibid.*

22. If a witness is asked whether *he has made representations* as to a particular fact and denies it, then evidence of such representations would be proper, but not in relation to collateral matters. *Ibid.*

23. On an indictment for bigamy, the second wife is admissible as a witness, either for or against the prisoner. *Ibid.*

24. Questions to a witness, tending to disparage or disgrace him may be asked, and cannot be objected to by the opposite party. Whether the witness is bound to answer them is doubtful. *Ibid.*

25. The presumption that he, who is found in possession of stolen goods recently after the theft was committed, is himself the thief, applies *only*, when this possession is of a kind which manifests that the stolen goods have come to the possessor *by his own act*, or, at all events, *with his undoubted concurrence*. *State* v. *Smith*, 402

26. Thus where the defendant Scipio Smith and two of his sons, who lived with him, were indicted for stealing tobacco, and the tobacco, which had been stolen in the night, was found the next day in an out-house of Scipio, occupied by one of his negroes, and in which Scipio kept tobacco of his own, and the tobacco so found was claimed by him as his own, though proven to be the tobacco that had been stolen; *Held* that it was error in the Judge to charge the jury "that the possession of the stolen tobacco, *thus* found in Scipio Smith, raised, in law, a strong presumption of his guilt." *Ibid.*

27. To prove the record of a suit in South Carolina, the plaintiff introduced the certificate of J. R., clerk of the Court, under the seal of the Court, "that the annexed are correct transcripts of the original proceedings filed in this office in the suit of William Todd, Administrator *v.* William Lee," to which was added the certificate of the presiding Judge "that J. R., who gave the attestation above set forth, is the clerk of the said Court, and keeper of the records thereof, and that said attestation is in due form;" *Held*, that this authentication was sufficient. *Lee* v. *Gause*, 440

See PRACTICE, DEVISE, CONSTABLE, CONTRACT, LAWS OF OTHER STATES, GIFTS, DEEDS, FORCIBLE ENTRY.

EXECUTION.

1. A *fi. fa.* is issued returnable to January Term, 1821, of a County Court, and is returned to that term. The clerk re-issues the same paper, marked on the back "alias to March Term, 1821," "alias to July Term, 1821," "alias to October Term, 1821," and signs his name as clerk to this memorandum. A sale of land, made by the sheriff under such a paper, between the July and October Terms, 1821, is utterly void. *Love* v. *Gates*, 14

2. After the return of *fi. fa.* regularly levied on land, the sheriff cannot sell the land without a new writ giving him that authority. *Ibid.*

3. A sheriff cannot sell under a *fi. fa.* what he has no power by the writ to sell—what is not goods or chattels, lands or tenements, within the sense of the writ, as, for example, bonds or bank stock; and the sale being a nullity, a bidder at such sale is not compellable to pay the amount of such bid. *Pool* v. *Glover*, 129

4. Where a debtor has made a conveyance of his land to a trustee, to be sold for the benefit of his creditors at a certain time, if the debts are not previously paid, and there is a resulting trust to himself, his equitable interest in the land may be sold under an execution, even before the day, when, by the terms of the deed, the trustee was authorized to sell his legal interest. *Ibid.*

See AMENDMENT, EVIDENCE.

FALSE IMPRISONMENT.

See ARREST.

FEME COVERT.

See DEED.

FORCIBLE ENTRY.

An indictment for a forcible entry into the *field* of the prosecutor, cannot be supported by evidence that the defendant peaceably entered the field, but while there threw stones against the house of the prosecutor, situated adjoining the field, the prosecutor at the time being in the house, and not in the field. *State* v. *Smith*, 127

FRAUDS AND FRAUDULENT CONVEYANCES.

1. A judgment of a Court, rendered on a day of the term subsequent to the day on which a conveyance of his property has been made by the defendant in the action, has relation back to the first day of the term, and an execution issuing thereon and tested of the same term will overreach such conveyance. *Finley* v. *Smith*, 225
2. Such a judgment, though voluntarily confessed by a defendant to a plaintiff, who had knowledge of the prior conveyance, is not, on that account, fraudulent as against him who claims under the conveyance. On the contrary the conveyance is considered in law fraudulent as against the judgment. *Ibid.*
3. It is fraudulent to receive from one partner, for his own separate debt, the security of the firm, unless he has authority from the other partners to that effect, or unless the creditor has reasonable and probable cause, from the conduct of the firm, to believe that such authority has been given. *Miller* v. *Richardson*, 250
4. A deed in trust for the sale of property, dated the 16th of August, 1841, made by an insolvent debtor for the benefit of preferred creditors, provided as follows: that the property shall be "at any time after the 1st of January, 1842, or before, if directed by the said Samuel B. Spruill" (the debtor) "on such terms and at such places as shall be directed by him; the said Henry J. Cannon" (the trustee) "is to sell the aforesaid property, and out of the proceeds to pay first the expenses of executing this indenture, in the next place, the debt of Thomas Deloach," (one of those recited in the premises of the deed) "and as to all the other debts and dues mentioned he is to pay them with interest and the costs now due, or which may become due, on suits now pending *pro rata*." A declaration or stipulation is then appended; "It is however stipulated that, as the said Samuel B. Spruill is anxious to save harmless all his securities, if there be any of them unprovided for in this indenture, he is at liberty to direct them to be paid in like manner as his other securities are." The property conveyed consisted of lands in different parts of this State, and of slaves in different counties, of contracts unexecuted &c. *Held* by the Court that these provisions did not *per se* make the deed fraudulent in law against other creditors. *Cannon* v. *Peebles*, 449

GIFTS.

1. A. living in North Carolina sent to his son-in-law B., living in South Carolina, certain negro slaves. Afterwards A., being in South Carolina at the plantation of B., where the negroes then were in the possession of B., told B., in the presence of other

persons, "that he (A) had no claim to the negroes or the other property that had been sent to B's wife," and further said, "that the negroes were the property of B., that B. might dispose of them as he saw proper, and that he (A) had no claim to them." The law in South Carolina, in relation to parol gifts of slaves, is the same as the common law respecting parol gifts of other personal chattels. *Adams* v. *Hayes*, 361

Held by the Court that this was not a gift of the negroes to B.—that to constitute a valid parol gift of personal chattels an *actual delivery* is necessary, that is, some *act* is required by which the *possession* of the thing delivered shall be *transferred* from the donor to the donee. The circumstance that the negroes are in the actual possession of the donee, at the time the parol declaration of gift is made, forms no exception to this general rule. *Ibid.*

2. If a gift had been made in South Carolina, according to the laws of that State, the gift would have been good here. *Ibid.*

3. For the purpose of shewing that a loan and not a gift to a married daughter was intended, it is not competent to prove that loans and not gifts were made to other daughters on their marriage. *Ibid.*

See DEED.

GRAND JURY.

See INDICTMENT.

GUARANTY.

1. In the case of an indemnity for becoming bail, the cause of action does not accrue until the bail is compelled to pay the money, and does actually pay it. *Reynolds* v. *Magness*, 26

2. Before a suit is brought on a contract of indemnity, notice of the loss should be given to the party indemnifying. *Ibid.*

3. On a guaranty of a bond, the condition of which bond was that the obligor should at a certain time pay a certain sum of money "on receiving from the obligee a title" to certain land, the plaintiff cannot recover without shewing a tender of a deed for the land to the obligor. *Gardner* v. *King*, 297

4. In such a case it is not necessary to shew a demand on the obligors for the money. *Ibid.*

5. In an action for breach of an agreement, which is in the nature of a guaranty, if the circumstance which is alleged as the foundation of the defendant's liability is more properly within the knowledge and privity of the plaintiff than the defendant, then notice thereof should be averred in the declaration, and proved on the trial. *Lewis* v. *Bradley*, 303

6. But where it does not lie more properly within the knowledge of one of the parties than the other, notice is not requisite. *Ibid.*

GUARDIAN.

See COSTS.

HOMICIDE.

If A, from previous angry feelings, on meeting with B., strikes him with a whip, with the view of inducing B. to draw a pistol, or believing he will do so, in resentment of the insult, and determines, if he does so, to shoot B. as soon as he draws, and B. does draw, and A. immediately shoots and kills B., this is murder. *State* v. *Martin*, 101

INDEX.

INDICTMENT.

1. Where an indictment charges a rescue, and also an assault and battery, and the defendant is convicted generally; if the averments as to the rescue are uncertain or bad, these may be rejected as superfluous and immaterial, and the Court may proceed to pass judgment upon the verdict as for an assault and battery. *State* v. *Morrison*, 9

2. To support an indictment for knowingly selling unwholesome provisions, the provisions sold must be in such a state as that, if eaten, they would, by their noxious, unwholesome, and deleterious qualities have affected the health of those who were to have consumed them. *State* v. *Norton*, 40

3. On an indictment under the act of Assembly, Rev. St. c. 34, s. 55, in relation to the altering or defacing the marks of cattle, &c., if the act of altering or defacing, &c., is proved to have been wilfully done, it necessarily follows that the intent was to defraud or injure the owner, unless there be proof to the contrary. *State* v. *Davis*, 153

4. It is no objection to a conviction on an indictment for this offence that the cattle, beast, &c.. had at the time the act was done, strayed from its owner. *Ibid.*

5. It is no ground for arresting judgment after conviction on an indictment, that it appears from the record that the grand jury, who found the bill, consisted of only fifteen persons. *Ibid.*

6. By the common law a grand jury may consist of any number between twelve and twenty-three. Our statute upon the subject of a grand jury is only directory to the Court, and does not declare void a bill or presentment found by a grand jury consisting of the common law number. *Ibid.*

7. The time at which a sentence in a criminal case shall be carried into execution, forms no part of the judgment of the Court. *State* v. *Cockerham*, 204

8. Therefore where a defendant, who had been convicted of an assault, was sentenced to be imprisoned for 2 calendar months "from and after the first day of November next," and did not go into prison according to the sentence, and at a subsequent term of the Court it was directed that the sentence for two months imprisonment should be immediately executed: *Held* that the Court had the power to make such order. *Ibid.*

9. Where a person is called in an indictment by the name of Deadema, and it is proved her name was Diadema, the variance is not material. *State* v. *Patterson*, 346

10. Where the defendant is indicted for a perjury, committed on the trial of an issue in a former indictment, the indictment must set forth the finding of the former indictment in the proper Court of the proper County, and should also set forth that indictment, or so much thereof as to shew, that it charged an offence committed in that County, and of which said Court had cognizance, and also the traverse or plea of the defendant in that indictment, wherein the issue was joined. Judgment on an indictment, defective in these particulars, must be arrested. *State* v. *Gallimore*, 372

11. The act of 1791 (Rev. Code, c. 338, s. 31,) is repealed by the Revised Statutes adopted in 1837, and the act of 1811, (Rev. Stat. c. 35, s. 12) does not cure such defects, for they are neither informalities nor refinements, within the meaning of that Statute. *Ibid.*

12. An indictment for a conspiracy, charging the object of the conspiracy to be, to cheat and defraud the citizens at large or particular individuals out of their land entries, is not supported by evidence, that the defendants conspired "to make entries in the land office before it was opened, or before it was declared to be opened, or after it was opened, for the purpose of appropriating the lands to their own use and excluding others." *State* v. *Trammell*, 379

13. Defendants in an indictment have a right to plead severally not guilty; but a general plea of not guilty by all the defendants, is in law a several plea. *State* v. *Smith*, 402

14. Whether the *trial* shall be separate or not, is a matter of sound discretion to be exercised by the Court under all the circumstances of the case. *Ibid.*

15. The right to challenge a juror is a right to reject, not to select—and therefore neither of two defendants in an indictment on a joint trial has cause to complain of a challenge by the other. *Ibid.*

16. Whether the trial be joint or separate, one defendant in an indictment cannot, until finally discharged, be a witness for another, and wherever the wife of one is not permitted to testify for the others on a joint trial, she will not be received for them although her husband be not then on trial. *Ibid.*

SEE ARREST.

INFORMER.

SEE PENALTY.

INJUNCTION BOND.

1. In an action upon a bond, the condition of which is to indemnify the plaintiffs "for all damages they might sustain by reason of the wrongful suing out of an injunction" by the defendants to stop the plaintiffs from working a certain gold mine, it is necessary for the plaintiffs to shew a want of probable cause for the former suit, and also, in a legal sense, malice in bringing it. *Fulls* v. *McAffee*, 236

2. But where it appears that the party who sued out the injunction really and *bona fide* entertained the belief that he had just grounds for his suit, the idea of malice is negatived, and the action upon the bond cannot be supported. *Ibid.*

INSOLVENT DEBTORS.

1. When a person has been arrested on a *ca. sa.*, and given bond for his appearance at Court, to take the insolvent debtor's oath, and the case is continued till the next term of the Court, a notice served on his creditors ten days before the term, to which the case is continued, is a sufficient notice under the act for the relief of insolvent debtors. *Watson* v. *Willis*, 17

2. If such person appears, either at the first term of the Court, or, when a continuance is granted, at that to which the case is continued, though he has failed to give the notice required by law, or for any other cause is not permitted to take the oath, yet no judgment can be rendered against his sureties in the bond, who are only responsible for his appearance. *Ibid.*

3. One, who has only applied to be declared a bankrupt, under the bankrupt law of the United States, but has not been declared a bankrupt, has no right to be discharged from his bond to appear

and take the benefit of the insolvent debtor's act of this State. *Ex parte Ziegenfuss*, 463

JURISDICTION.

An action on a sheriff's bond, in the name of the State to the use of an injured party, may be brought in the Superior Court of the county in which the relator resides, though all the defendants reside in a different county. *State* v. *McGee*, 209

JUDGMENT.

See INDICTMENT.

JUSTICES' JUDGMENT.

Where A owes B. a debt by note of upwards of one hundred dollars, and in lieu thereof gives B. several notes of less than one hundred dollars, so that judgments may be taken on them before a Justice of the Peace, this is not either in fraud or evasion of the statute, prescribing the jurisdiction of Justices of the Peace out of Court. *Fortescue* v. *Spencer*, 63

See SHERIFF.

LANDLORD AND TENANT.

1. A tenant, who is about to remove, has a right, where there is no covenant nor custom to the contrary, to all the manure made by him on the farm; it is his personal property, and he may take it with him. *Smithwick* v. *Ellison*, 326
2. But the manure ceases to be his, if he leaves it when he quits the farm. *Ibid.*
3. Taking up with the manure the slight portion of the earth, which is necessarily mixed with it in raking it into heaps, will not make the tenant a *tort feasor*. *Ibid.*

LARCENY.

See EVIDENCE.

LAWS OF OTHER STATES.

1. The laws of this State, at the time of the cession of Tennessee, must be taken to be the laws of that State, until it is shewn that they have been altered or repealed. *State* v. *Patterson*, 346
2. The certificate of the Secretary of State, in relation to the statutes of another State, given in pursuance of our Statute (Rev. Stat. c. 44, s. 3) is evidence in criminal as well as in civil cases. *Ibid.*

See DEEDS, GIFTS, MARRIAGE.

LICENSE.

1. It is not reasonable, and therefore not legal, to presume a more extensive license than is essential to the enjoyment of what is expressly granted. *Gardner* v. *Rowland*, 247
2. Therefore a license to enter a man's land for the purpose of taking off corn must be construed a license to enter by the usual mode of access provided for such purpose, as through the gate or other appropriate entrance. *Ibid.*

LIMITATIONS, ACTS OF.

1. Where an action is brought against an obligor and the representative of a deceased obligor, and as to the latter the action is barred by the act barring claims against deceased persons' estates, (Rev. Stat c. 65, s. 11,) a judgment may still be recovered against the

former, for the act does not extinguish the debt, but only bars the remedy against the person to whom it applies. *Buie* v. *Buie*, 87

2. The want of a person, against whom to bring suit, rebuts the presumption of payment arising from forbearance to sue. *Ibid.*

3. In case of one dying intestate in another State, the statute of limitations does not begin to run, until administration is granted in this State. *Lee* v. *Gause*, 440

MANDAMUS.

A writ of mandamus will not be granted to a relator for his relief, except where he has a *specific legal* right, and has no other specific remedy adequate to enforce it. *State* v. *Justices of Moore.*

See APPEAL.

MANURE.

See LANDLORD AND TENANT.

MARRIAGE.

1. Marriage is in law complete, when parties, able to contract and willing to contract, have actually contracted to be man and wife in the forms and with the solemnities required by law. Consummation by carnal knowledge is not necessary to its validity. *State* v. *Patterson*, 346

2. Where a marriage is solemnized in another country, in the manner prescribed by the laws of this State, the Court must understand such a marriage to be good, unless the contrary be shewn. *Ibid.*

MILLS.

See PRESUMPTION.

MISNOMER.

See INDICTMENT.

MORTGAGE.

See EJECTMENT.

NEW TRIAL.

See PRACTICE.

OFFICERS.

See ARREST.

PARTNERS.

See FRAUD.

PENALTY.

Where a judgment is recovered in the name of the Wardens of the Poor by a relator for a penalty, to one-half of which he is by law entitled, he may release one-half of the judgment, that being his own share, but he cannot release the other half, which belongs to the Wardens. *Wardens* v. *Cope*, 44

PERJURY.

See INDICTMENT.

PLEADING.

See PRACTICE AND PLEADING, COSTS.

INDEX.

PRACTICE AND PLEADING.

1. Where the Judge below has misdirected the jury, yet the verdict has been such as it ought to have been, had there been no misdirection, this Court will not grant a new trial. It will only do so, where the misdirection has misled the jury into a wrong verdict. *Reynolds* v. *Magness*, 26

2. Where there is no evidence to establish a fact, the Judge has a right so to instruct the jury. *Rowland* v. *Rowland*, 61

3. Where deeds, records, &c. are referred to, and make a necessary part of the case transmitted to the Supreme Court, it is the duty of the appellant to see that they accompany the case. Otherwise the Court cannot determine that there is any error in the opinion of the Court below, and the judgment will of course be affirmed. *Waugh* v. *Andrews*, 75

4. A party cannot except for error to an instruction which he hath himself prayed. *Buie* v. *Buie*, 87

5. It is a question of law for the Court, what facts will repel the presumption of payment under the Act of Assembly, (Rev. Stat. c. 65, s. 13.) *Ibid.*

6. Where a person is sued in the same action as executor of A and also as administrator of B. it is irregular to enter a non-suit, so far as he is sued in the one capacity, and a judgment against him in his other capacity. A *nolle prosequi* is the proper course. *Ibid.*

7. The Court is not bound to lay down to the jury an abstract proposition, but only to state the law as applicable to the evidence introduced. *State* v. *Martin*, 101

8. It is not the duty of the State or of those who prosecute for it to examine, on a criminal trial, all the witnesses who were present at the perpetration of the fact, or all the witnesses who had been sent to the grand jury.—It is the province of the prosecuting officer, and not of the Court, to determine who shall be examined as witnesses on the part of the Sttate. *Ibid.*

9. An objection to a grand juror comes too late after a plea to the felony. *Ibid.*

10. A Clerk of a court, to whom a *certiorari* has been directed, should make a return "that in obedience to that writ he has sent the annexed record;" and this should be made under his hand and seal of office. *Ibid.*

11. A Court may either sit without adjournment, or it may adjourn from one day to another within the term allotted to it; but it is not necessary to state the adjournment on the record. *Ibid.*

12 Where two or more are indicted, it is competent for the Court to order a removal of the trial of one, on his application, to another county without removing the trial of the others. *Ibid.*

13. Where the record uses the past tense, as that, in the award of a *venire facias*, the Sheriff *was* commanded, or the indictment *was* found, &c., this, though not strictly regular, has been for so long a time the practice in this State, that the Court will not pronounce it a fatal error. *Ibid.*

14. Where two have been tried on an indictment, and the record sent to the Supreme Court, sets forth only the verdict in the case of one who appealed, and does not state the verdict in the case of the other, this is not an error of which the appellant can take advantage. *Ibid.*

15. Where a plaintiff issued three separate writs on different days against three individuals, endorsing on each writ that it was for the same cause of action and in the same suit as the writs issued against the other two, and upon their return they were docketed as one suit, and the defendants appeared and put in pleas thereto; *Held* that whatever irregularities may have occurred in suing out the writs, these were waived by the defendants accepting a joint declaration and putting in pleas in bar thereto. *Hyat* v. *Tomlin*, 194

16. When an interlocutory decree below is appealed from, it is the duty of the Court below to state specifically in the case transmitted to the Supreme Court the question or matter, from a decision on which the appeal is taken. *Jacocks* v. *Mullen*, 162

17. Where a bond was made payable to A. as executor, with a condition that the obligor would pay a certain sum for the lease of lands belonging to the estate of A's testator, and to return the premises in good repair; *Held* that the suit may be brought in the name of A. without describing him as executor—the words "executor &c." being mere surplusage. *Waddell* v. *Moore*, 261

18. Where claims put into a constable's hands for collection belong to a co-partnership, all the members of the firm, being in law the "persons injured," must be relators in an action for a breach of the constable's bond in not collecting such claims; notwithstanding any private agreement or arrangement among the partners, as to the beneficial interest in the proceeds of the claims. *State* v. *Lightfoot*, 306

19. Where the Judge left a material fact, alleged in the plaintiff's declaration, to the jury, when there was no evidence to support it, and the jury found for the plaintiff, a new trial will be awarded. *Jones* v. *Eason*, 331

20. When from the circumstances proved in a case, a reasonable suspicion or presumption of a fact may be inferred, although the Court might think the jury would be well justified in not inferring such fact, yet it is not error in law in the Court to submit the matter to the jury to be passed upon by them. *Blackledge* v. *Clark*, 494

See INSOLVENT DEBTORS, EJECTMENT, AMENDMENT, INDICTMENT, BENEFIT OF CLERGY, RECOGNIZANCE, PROHIBITION.

PRESUMPTION.

1. The ground on which is presumed a grant of the privilege of ponding water on another's land for the purpose of a mill is, that it has been enjoyed by the person claiming and those with whom he connects himself for twenty years or more in the state or to the extent to which he claims. *Gerenger* v. *Summers*, 229

2. It is no answer to this presumption that the height of the water had been sometimes lowered by a drought, or that the water had been occasionally let off for the purpose of repairing the mill, and only for the period required for such purpose. *Ibid.*

See LIMITATIONS, PRACTICE, EVIDENCE.

PROHIBITION, WRIT OF.

1. It *seems* that no court has the power to issue a writ, pending a dispute between competitors for a public office, to prohibit those who are *de facto* in possession of the office, from exercising the functions thereof. *State* v. *Allen*, 183

2. If any court has the power, it should never exercise it, except in a very clear case, peremptorily calling for an immediate remedy. *Ibid.*

3. If a writ of prohibition can be issued, it should only be after notice to the parties to be affected, and affidavits verifying the suggestions upon which the writ is granted. *Ibid.*

PURCHASER.

See VENDOR AND VENDEE.

RECOGNIZANCE.

1. The Solicitor for the State is not entitled to a fee on a recognizance to keep the peace. *State* v. *Red*, 265

2. When such a recognizance is taken and not returned to the term of the court to which it is returnable, and the recognizance is not broken before the return term, *no* costs can, at a subsequent term, be awarded against the defendant. *Ibid.*

3. If a magistrate fails to return, at the proper term, a recognizance to keep the peace, and the recognizance is broken, the Solicitor of the State may, at a subsequent term, cause the recognizance to be returned, suggest a breach, enter a judgment *nisi*, and issue a *scire facias* *Ibid.*

RENT.

Where a guardian rented land and took no bond or other security to himself for the rent, and before the rent became due, the ward came of age and conveyed the land in fee to the lessee; *Held* that the rent, being incidental to the reversion, was extinguished by this conveyance of the reversion to the lessee. *Mixon* v. *Coffield*, 301

RESCUE.

See INDICTMENT.

ROADS.

1. When a road has been laid off by order of a County Court upon the report of a jury, confirmed by the Court, and an appeal is taken to the Superior Court, it is too late to take exceptions to the jury. The objection should have been made in the Court below, upon the return of the jury, by a motion to quash the proceedings of the jury. *Piercy* v. *Morris*, 168

2. Upon an appeal from the final judgment of the County Court on the merits of the case, the Superior Court can only determine on the merits. *Ibid.*

SHERIFF.

1. Under the act of 1836, Rev. Stat. c. 99, s. 23, an action may be supported on the official bond of the sheriff for the neglect of his deputy to collect a claim put in his hands for collection, although the amount of the claim is within the jurisdiction of a single justice of the peace. Justices may direct their warrants as well to sheriffs as to constables. *State* v. *Roane*, 144

2. It is no defence to such an action, that after the default of the deputy, the plaintiff has endeavored, but unsuccessfully, to collect his claim himself from his debtor. *Ibid.*

See ARREST—EVIDENCE.

SLANDER.

Calling one a thief or a murderer, in the absence of context or proof

to the contrary on the trial, *ex vi termini*, imputes to him a felony, and therefore an action of slander well lies. *Dudley* v. *Robinson*, 141

SLAVES.

See DEEDS, GIFTS.

TRESPASS.

1. If an inquiry to another be immediate, and committed with force, either actual or implied, it is the subject of an action of trespass, *vi et armis*, whether the injury be *wilful or not*. *Newsom* v. *Anderson*, 42
2. Where a person was cutting down trees growing on his own land, and one of them accidently fell on his neighbor's land; *Held*, that an action of trespass *quare clausum fregit* would lie, whether there was any grass or other vegetable matter growing on the ground or not. *Ibid.*
3. Where one unintentionally does an act with force, which produces an immediate injury, the person injured may bring an action of *trespass*, or an action *on the case*, and in the latter he declares upon the *negligence* or *carelessness* of the defendant. *Baldridge* v. *Allen*, 206
4. But when the forcible act is done *wilfully*, negligence is of course negatived, and the only remedy is *trespass* for the immediate injury. *Ibid.*
5. In such an action of trespass, damages for ulterior injuries beyond the immediate injury, are to be recovered under a *per quod*, on being specially stated in the declaration. *Ibid.*
6. He who abuses a *legal* license is a trespasser *ab initio*. *Gardner* v. *Rowland*, 247
7. Where a man's hogs get on another's land, if he lets down a fence to drive them out, instead of driving them through a gap or gate, when there are such, he is guilty of a trespass. *Ibid.*

See COSTS, LICENSE, ACTION.

TROVER.

1. Where property bailed has been lost by the bailee, or stolen from him, or been destroyed by accident or from negligence, trover will not lie, but *case* is the proper remedy. *Simmons* v. *Sikes*, 98
2. But where the bailee has been an agent in the destruction of the property, or in its injurious conversion, trover will lie against him. *Ibid.*

TRUST.

See EXECUTION—FRAUD.

VENDOR AND VENDEE.

1. In an action for goods sold and delivered, a delivery, actual or constructive, must be shewn.—If the goods were bargained for, but the delivery postponed for the happening of some future event or to some future period, the sale was not complete, and the vendor has no right to sue for the purchase money. *Allman* v. *Davis*, 12
2. Where there is a contract for the sale of goods, although the goods may have been put in possession of the vendee, yet if something still remains to be done by the vendor before the con-

tract is completed, as to ascertain the price, quantity or individuality of the goods, the constructive possession and the property still remain in the vendor. *Devane* v. *Fennell*, 36

VERDICT.

See EVIDENCE.

WARDENS OF THE POOR.

1. The Wardens of the Poor may exercise the authority given them by the act (Rev. Stat. c. 89, s. 24) to seize any cattle, horses, hogs or sheep, belonging to a slave, either in person or by a precept or authority directed to another. *McNamara* v. *Kerns*, 66
2. Such a precept or authority directed to "any constable of a county," without specifying his name, will justify the constable who executes it, if his act be afterwards ratified by the Wardens. *Ibid.*
3. It is not necessary that to such an authority or precept the Wardens should sign their names as Wardens, if in fact they were so. *Ibid.*
4. By the phrase "cattle, hogs, &c *belonging* to slaves," the Statute means such cattle, hogs, &c. as the master permits the slave to raise for his own use, and to exercise acts of dominion and ownership over, as if they were his own. *Ibid.*

See CONSTITUTION.

WARRANT.

See ARREST.

WARRANTY.

1. To make an affirmation at the time of a sale a warranty, it must appear upon evidence to have been so intended, and not be a mere matter of opinion and judgment. *Baum* v. *Stevens*, 411
2. Whether an affirmation in a parol contract of sale amounts to a warranty, is a matter of fact to be left to the jury, with instructions from the Court according with the above rule. *Ibid.*

WILL.

See DEED.